

Law Office of Debra R. Torres-Reyes
 Debra R. Torres-Reyes
 State Bar No. 146724
 1901 First Ave., Ste. 158
 San Diego, Ca 92101
 (619) 237-7891
 (619) 237-1156 Fax
 dtr4justice@aol.com

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA
 (HONORABLE IRMA E. GONZALEZ)

UNITED STATES OF AMERICA)	CASE NO. 07CR-3279-IEG
)	
Plaintiff,)	DATE: JANUARY 14, 2008
)	TIME: 2:00 P.M.
v.)	CTRM:
)	
IVAN FLORES,)	MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF
Defendant.)	DEFENDANT'S MOTIONS FOR:
)	
)	(1) DISCOVERY; AND
)	(2) LEAVE TO FILE
)	ADDITIONAL MOTIONS

COMES NOW defendant, IVAN FLORES, by and through his attorney, Debra R. Torres-Reyes, and submits the following Memorandum of Points and Authorities, and argument in support of his motions.

I.

MOTION TO COMPEL DISCOVERY

To preserve his rights and guard against undue prejudice due to delay, defendant seeks an order compelling discovery of the following material, and further seeks an order establishing a discovery schedule in this case. Defendant requests full discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure, *Brady v. Maryland*, 373 U.S.

1 83(1963), the Jenks Act (18 U.S.C. § 3500), and the
2 Fifth and Sixth Amendments of the United States
3 Constitution. For the purposes of Rule 16 discovery and
4 Brady the prosecutor "will be deemed to have knowledge
5 of and access to anything in the possession, custody or
6 control of any federal agency participating in the same
7 investigation of defendant." *United States v. Bryan*,
8 868 F.2d 1032, 1036 (9th Cir. 1989). Defendant requests
9 that discovery be completed reasonably in advance of
10 trial so that he can make use of the materials provided
11 in his defense.

12 This court has the authority to provide discovery
13 by a certain date and bar the use of any evidence not
14 disclosed after that date. This authority is expressly
15 conferred under Rule 16(d)(2) and has been upheld in a
16 number of cases. See, e.g. *Taylor v. Illinois*, 484
17 U.S. 400 (1988) (exclusion of surprise defense witness
18 for discovery violation does not violate defendants
19 rights); *United States v. Aceves-Rosales*, 832 F.2d 1155
20 (9th Cir. 1987) (not abuse of discretion to bar defense
21 use of evidence discovered and subpoenaed the day
22 before trial but not disclosed until after the
23 government had rested in violation of Rule 16); *United*
24 *States v. Burgess*, 791 F.2d 676 (9th Cir. 1986) (government
25 barred from making any use, including use for
26 impeachment, of non-disclosed inculpatory statement
27 made to DEA agent). The Court's authority to enforce
28 such orders against the government by excluding
evidence is beyond dispute. *United States v. Roybal*,
566 F.2d 1109, 1110-11 (9th Cir. 1977); see also *United*
States v. Gatto, 763 F.2d 1040, 1046-47 (9th Cir.

1 1985); United States v. Schwartz, 857 F.2d 655, (9th Cir.
2 1988).

3 A discovery schedule is authorized by Rule 16(d) (2)
4 and will serve to avoid delay, conserve scarce judicial
5 resources, prevent surprise, and further the search for
6 the truth at trial. This Court should therefore impose
7 discovery schedule and bar the introduction of evidence
8 not disclosed by that date. Defendant seeks discovery
9 of the following.

10 (1) Statements of The Defendant

11 Pursuant to Rule 16(a) (1) (A), defendant requests
12 full discovery concerning any statements made by him.
13 The rule requires disclosure of any statement of the
14 defendant's in the possession of the government in any
15 form. It also requires disclosure of any portion of
16 any report or other written record containing the
17 substance of a statement by the defendant made to a
18 known government agent, and the substance of any other
19 statement made by the defendant to a known government
20 agent which the government intends to use at trial for
21 any purpose.

22 The government must disclose not only the substance
23 of the defendant's statement but also the substance of
24 the defendant's statements. If there is a recording,
25 the defense requests it forthwith.

26 (2) Arrest Reports and Notes. The defendant also
27 specifically requests the government to turn over all
28 arrest reports, notes and TECS records, dispatch tapes
and police records, and California State police office
reports (if an officer was involved), relating to the
circumstances surrounding his arrest or any

1 questioning. This request includes to the circumstances
2 surrounding his arrest or any questioning. This request
3 includes, but is not limited to, any rough notes,
4 records, reports, transcripts or other documents in
5 which statements of the defendant or any other
6 discoverable material is contained. Such material is
7 discoverable under Fed.R.Crim. P.16(a)(1)(A) and Brady
8 v. Maryland, 373 U.S. 83 (1963). The government must
9 produce arrest reports, investigators' notes, memos
10 from arresting officers, sworn statements, and
11 prosecution reports pertaining to the defendant. See
12 Fed.R.Crim.P. 16(a)(1)(B) and (C), 26.2 12(1); United
13 States v. Harris, 543 F.2d 1247, 1253. (9th Cir. 1976)
14 (original notes with suspect or witness must be
15 preserved); see also United States v. Anderson, 813
16 F.2d 1450, 1458 (9th Cir. 1987) (reaffirming *Harris*'
17 holding).

18 (3) Brady Material. The defendant requests all
19 documents, statements, agents' reports, and tangible
20 evidence favorable to the defendant on the issue of
21 guilt and /or which affects the credibility of the
22 government's case. *Kyles v. Whitley*, 514 U.S. 419
23 (1995). Under *Brady*, *Kyles* and progeny, impeachment as
24 well as exculpatory evidence falls within the
25 definition of evidence favorable to the accused. See
26 also United States v. Bagley, 473 U.S. 667 (1985);
27 United States v. Agurs, 427 U.S. (1976). All
28 information, including notes, memos, the substance of
conversations (even if not yet memorialized) should be
disclosed. This includes any information that may
result in a lower sentence under the Guidelines.

1 (4) The Defendant's Prior Record. The defendant
2 requests disclosure of his prior record. Fed.R.Crim.P.
3 16(a)(1)(B), including both convictions and arrests, if
4 applicable.

5 (5) Any Proposed 404(b) Evidence. The government
6 must produce evidence of prior similar acts under
7 Fed.R.Crim.P. 16(a)(1)(c) and Fed.R.Evid. 404(b) and
8 609. In addition, "upon request of the accused, the
9 prosecution. . .shall provide reasonable notice in
10 advance of trial . . . of the general nature" of any
11 evidence the government proposes to introduce under
12 Fed. R. Evid. 404 (b) at trial in both case-in-chief
13 but also to evidence which the government may use as
14 rebuttal. See United States v. Vega, 188 F.3d 1150 (9th
15 Cir. 1999). The defendant is entitled to "reasonable
16 notice" so as to "reduce surprise," preclude "trial by
17 ambush" and prevent the "possibility of prejudice." *Id*;
18 United States v. Perez-Tosta, 36 F.3d 1552, 1560-61
19 (11th Cir. 1994), and he requests such notice at least
20 two weeks before trial in order to give the defense
21 time to adequately investigate and prepare for trial.

22 (6) Evidence Seized. The defendant requests
23 production of evidence seized as a result of any
24 search, Fed.R.Crim.P. 16(a)(1)(C).

25 (7) Request for Preservation of Evidence. The
26 defendant specifically requests the preservation of any
27 and all physical evidence that may be destroyed, lost,
28 or otherwise put out off the possession, custody, or
care of the government and which relates to the arrest
or the events leading to the arrest in this case.

 (8) Expert Witnesses. The defendant requests the

1 name, qualifications, and a written summary of the
2 testimony of any person that the government intends to
3 call as an expert witness during its case in chief.
4 Fed.R.Crim.P. 16(a)(1)(E).

5 The defense requests the notice of expert testimony
6 be provided at a minimum of two weeks prior to trial so
7 that the defense can properly prepare to address and
8 respond to this testimony, including obtaining its own
9 expert and/or investigating the opinions and
10 credentials of the government's expert. The defense
11 also requests a hearing in advance of trial to
12 determine the admissibility of qualifications of any
13 expert. See Kumho Tire Co. v. Carmichael, 526 U.S. 137
14 (1999) (trial judge is "gatekeeper" and must determine,
15 reliability and relevancy of expert testimony and such
16 determinations may require "special briefing or other
17 proceedings").

18 (9) Evidence of Bias or Motive to Lie. The
19 defendant requests any evidence that any prospective
20 government witness is biased or prejudiced against the
21 defendant, or has a motive to falsify or distort his or
22 her testimony; this request encompasses all impeachment
23 evidence, including internal investigations,
24 disciplinary actions, suspected or confirmed criminal
25 activity and conflicting statements made by government
26 witnesses.

27 (10) Giglio Information. Pursuant to Giglio v.
28 United States, 405 U.S. 150 (1972), the defendant
requests all statements and/or promises, express or
implied, made to any government witnesses, in exchange
for their testimony in this case, and all other

1 information which could arguably be used for the
2 impeachment of any government witnesses.

3 (11) Jencks Act Material. The defendant requests
4 production in advance of trial of all material,
5 including dispatch tapes and radio communications,
6 which the government must produce pursuant to the
7 Jencks Act, 18 U.S.C. § 3500; Fed.R.Crim.P. 26.2.
8 Advance production will avoid the possibility of delay
9 at the requests of defendant to investigate the Jencks
10 material. A verbal acknowledgment that "rough" notes
11 constitute an accurate account of the witness'
12 interview is sufficient for the report or notes to
13 qualify as a statement under section 3500(e)(1).
14 Campbell v. United States, 373 U.S. 487, 490-92 (1963);
15 see also United States v. Boshell, 952 F.2d 1101 (9th
16 Cir. 1991) (holding that where an agent goes over
17 interview notes with subject, interview notes are
18 subject to Jencks Act).

19 (12) Residual Request. Defendant invokes his right
20 to discovery to the fullest extent possible under the
21 Federal Rules of Criminal Procedure and the
22 Constitution and laws of the United States.

23 II.

24 DEFENDANT SHOULD BE GRANTED

25 LEAVE TO FILE ADDITIONAL MOTIONS

26 As of the filing of this motion, the Defense has
27 received some discovery from the government. Therefore
28 the production of any additional discovery may
demonstrate the need for filing other motions.

Accordingly, due to the unavailability of such
discovery, it is requested that the defendant be given

1 an opportunity to file appropriate motions at a later
2 date.

3 Furthermore, defendant respectfully requests the
4 right to file in limine motions relating to evidentiary
5 matters as well as other pretrial motions which become
6 necessary in light of production of additional motions.

7 **III.**

8 **CONCLUSION**

9 For all of the foregoing reasons, Ivan Flores, by
10 and through his attorney, Debra R. Torres-Reyes,
11 respectfully requests that the above-entitled motions
12 be granted.

13 Dated: January 7, 2008

Respectfully submitted,
14 s/Debra R. Torres-Reyes
Debra R. Torres-Reyes
15 Attorney for Ivan Flores
16
17
18
19
20
21
22
23
24
25
26
27
28